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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 396

AIR INDIA, a foreign carrier,

Petitioner,

vs.

LARRY J. HOFFMAN, as Executor of the Estate of E. W. CALLAWAY, deceased, and BANK OF COMMERCE OF FLORIDA, Guardian of the property of SARAH CALLAWAY, a minor,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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NOTE: All Emphasis Supplied.

R.: Record on Appeal, Case No. 67-76, Hoffman v. Air India et al, pages 1-115.

RI.: Record on Appeal, contained in same volume, Case No. 67-75, Bank of Commerce of Florida v. Air India et al, pages 1-79.

P.: Petition for Writ of Certiorari.

P. App.: Appendix to Petition.

The respondents, Larry J. Hoffman, as Executor of the Estate of E. W. Callaway, deceased, and Bank of Commerce of Florida, Guardian of the property of Sarah Callaway, a minor, file this brief in opposition to the petition for a writ of certiorari heretofore filed in this Court by Air India.

The petitioner, Air India, a foreign corporation, seeks review of a judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which reversed judgments of dismissal for lack of jurisdiction over the person of the defendant, Air India, entered by the United States District Court in and for the Southern District of Florida (P. App. 5-8, 9-11, 11-14).

The underlying causes arose out of the death of E. W. Callaway as the result of the tragic crash of an Air India airliner, a Boeing 707, into Mont Blanc, near Chamonix, France, on January 24, 1966 (R. 2-3; RI. 7).

Case No. 67-76 was brought by Larry J. Hoffman, as the executor of the estate of Mr. Callaway, in the United States District Court in and for the Southern District of Florida on diversity grounds (R. 1-14). Case No. 67-75 was brought by the Bank of Commerce of Florida, as guardian of Sarah Callaway, the surviving minor child of Mr. Callaway and his next of kin (RI. 1-16). In the actions, damages for wrongful death and for damages to the estate and for pain and suffering prior to death were sought. Both actions were brought in the Federal court on diversity grounds by Florida citizens against foreign corporations (R. 1-2; RI. 1-2).

In each case, negligence and breach of contract of safe carriage was alleged against Air India, a common carrier for hire, in the operation, maintenance and con-

trol of the airliner. Each complaint contained the same allegations in this regard (R. 4-14; RI. 1-16).

Air India specifically moved, inter alia, to dismiss and to quash service upon the grounds of lack of jurisdiction over its person (R. 36; RI. 35). In its motions, Air India claimed that it was not doing business in Florida and that, in any event, the causes of action alleged did not arise out of the activities of Air India in Florida; and thus jurisdiction over the person was not acquired under F.S. 47.16 or 47.17 or 47.171 (the Florida Long-Arm Statutes) (R. 36-37; RI. 35-36). Affidavits were filed and discovery had on the issue. The trial court, after hearing, then granted the motions to dismiss in virtually identical orders. In each case, it held that there was an inadequacy of service of process and lack of jurisdiction over the person (R. 67-68; RI. 56-57). In each order, the court held that:

> "Florida's Long-Arm Statute is not long enough to permit the service that has been attempted here".

Appeals were taken to the Fifth Circuit by the plaintiffs from the judgments of dismissal (R. 77; RI. 67). The appeals were consolidated.

In a well reasoned opinion, 393 F.2d 507 (P. App. 5-8), the Fifth Circuit reversed and reinstated the causes.

I

OPINIONS BELOW

District Court: Opinions, in virtually identical language, contained in orders of trial court granting motions to dismiss for lack of jurisdiction over the person, found in Appendix to Petition for Writ of Certiorari, pages 9-11, 11-14.

Fifth Circuit: Opinion, 393 F.2d 507, contained in Appendix B to the Petition for Writ of Certiorari, pages 5-8.

Briefly stated, the trial court, in its orders, which were virtually identical, found as follows in the respective cases:

> "THIS CAUSE was heard upon defendant AIR INDIA'S Motion to dismiss for inadequacy of service of process. There is no dispute as to the following facts. Captain Callaway purchased a ticket in New York for air transportation to and from Bombay, India, via AIR INDIA. In Bombay, at the request of Captain Callaway, AIR INDIA changed his return ticket so that he had a stopover privilege in Paris. Captain Callaway died as a result of the airplane's crashing into Mont Blanc near Chamonix, France.
>
> "This action was instituted by LARRY J. HOFFMAN[1] in this Court and service of process was served upon the district sales manager for AIR INDIA in Miami. AIR INDIA operates no aircraft to or from Florida. It has no operational activities in Florida except maintenance of an off-line sales office, with four employees of which the district sales manager is one. The activities of the sales office are restricted to the sale of airplane tickets for AIR INDIA whose flights originate and terminate outside the state of Florida, and connecting flights. The sales office in Miami had no connection whatever with arranging the transportation or the sale of the ticket for Captain Callaway.

[1] In the companion case the words "Bank of Commerce of Florida" are found in place of "Larry J. Hoffman" in an otherwise similar order - opinion.

"Florida's long-arm statute is not long enough to permit the service that has been attempted here. See Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961); Illinois Central Railroad Co. v. Simari, 191 So.2d 427 (Fla. 1966). Thereupon, it is

"ORDERED and ADJUDGED that defendant AIR INDIA'S Motion to Dismiss for lack of jurisdiction be and the same is hereby granted.

"DONE AND ORDERED at Miami, Florida, this 13th day of March, 1967.

"/s/ CHARLES B. FULTON
United States District Judge"

(P. App. 9-10; R. 67-68; P. App. 12-13; RL 56-57).

The Fifth Circuit opinion, reported at 393 F.2d 507 (P. App. 5-8), dated March 26, 1968, reads as follows:

"PER CURIAM: The District Judge dismissed Apellants suits (filed January 1967) against Air India for lack of jurisdiction over the person of that foreign corporation. The sole question presented is whether Florida's long-arm statute, F.S.A. §§47.16, 47.17, 47.171, and especially §47.17(4), [footnote containing amended statute] is long enough to subject Air India to suit in Florida on a claim which did not arise in any way out of Florida activities. [Footnote]. We reverse.

"Air India's only troublesome contention is that for service of process on its resident agent to be perfected under Florida's long-arm statute the cause of action must arise out of the foreign

corporation's business activities within the State of Florida notwithstanding the fact that it maintained an office in Miami in which it regularly carried on substantial business for its own profit. [Footnote containing detailed statement of manager's authority in Florida, and substantial activities of Air India in Florida].

"Subsequent to the decision below and indeed during the pendency of this appeal this contention was decided adversely to Air India in the recent case of **Woodham v. Northwestern Steel and Wire Co.**, 5 Cir., 1968, (390 F.2d 27) [No. 24617, Feb. 5, 1968]. In a fact situation not nearly so strong as this one this Court held that 'where a business agent of a foreign corporation actually resides in Florida and engages in sustained, continuous business for his employer, the corporation may be sued by service on a resident agent under §47.17(4), F.S.A., regardless of where the cause of action arose * * *'". ____ F.2d at ____.

"The Florida arm, short or long, is long enough to reach the one-third mile from the United States Courthouse, 300 N.E. First Avenue, Miami, to nearby 100 Biscayne Boulevard, North.

"REVERSED.

[Matter in brackets supplied; footnotes omitted].

"JONES, Circuit Judge, Concurring Specially:

"I dissented in **Woodham v. Northwestern Steel and Wire Co.**, cited in the Court's opinion, because of my belief that the persons upon whom process was served were not of the kind neces-

sary to come within the purview of the Florida Statute. I concur in the decision in this case because I believe that the doctrine of stare decisis requires it. I concur for the further reason that the agents upon whom service of process was made in this case were of a kind which the Florida Statute did and properly could permit service to be made upon." (P. App. 5-8;).

II

QUESTIONS PRESENTED

The respondents disagree with the form of the questions presented, as framed in the petition (P. 2, 3). Rather, the questions here simply are:

A. WHETHER AIR INDIA WAS PRESENT IN FLORIDA IN THE TRADITIONAL SENSE, IN A SYSTEMATIC CONTINUOUS FASHION, SO AS TO CONSTITUTIONALLY JUSTIFY PERSONAL SERVICE IN FLORIDA UPON ITS FLORIDA RESIDENT BUSINESS MANAGER AND AGENT—WHO WAS ANSWERABLE ONLY TO A SUPERIOR IN NEW YORK —UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION;

B. WHETHER IT WAS NECESSARY TO SHOW, UNDER THE FACTS OF THIS CASE, IN ORDER TO CONSTITUTIONALLY SUPPORT PERSONAL SERVICE UPON THE FLORIDA RESIDENT BUSINESS MANAGER AND AGENT, AND IN PERSONAM JURISDICTION OVER AIR

INDIA, THAT THE CAUSES OF ACTION SUED UPON AROSE OUT OF THE ACTIVITIES OF THE FOREIGN CORPORATION IN FLORIDA.

C. WHETHER FLORIDA STATUTE 47.17(4), AS IT EXISTED AT THE TIME OF THIS ACCIDENT, AND AT THE TIME PERSONAL SERVICE WAS MADE UPON ITS RESIDENT MANAGER IN FLORIDA, REQUIRED THAT PERSONAL SERVICE IN THE STATE UPON A RESIDENT MANAGER, COULD BE MADE ONLY WHEN THE TORT SUED UPON AROSE OUT OF THE ACTIVITIES OF THE FOREIGN CORPORATION IN FLORIDA.

As will be herinafter shown, the answer to issue "A" is affirmative, and the answers to "B" and "C" are negative, under well-established doctrines.

III

STATUTES INVOLVED

The statutory provisions involved are:

Section 47.16, Florida Statutes

Section 47.17, Florida Statutes

Section 47.17, Florida Statutes, amended effective July 25, 1967

Section 47.171, Florida Statutes.

These statutory provisions are printed in Appendix A to the Petition for Writ of Certiorari.

IV

STATEMENT

The respondents have no quarrel with the trial court's statement of facts in its orders granting the motions of Air India to dismiss for lack of jurisdiction over its person. Indeed, the facts were culled out of the affidavit of Mr. Boggs, the resident manager of the defendant in Florida. But the statement of facts was not absolutely complete and did not go far enough in view of the issues involved.

The record clearly shows, in the affidavit of Mr. Boggs, the trial court's order itself, and the deposition of Mr. Boggs, that, first of all, Air India in fact was "present" in Florida in the traditional sense and was doing business in Florida, and was present in the state both at the time of the accident and at the time of service upon it.

The record, of course, clearly demonstrates that Air India was served in both cases by personal service on Mr. Boggs, its resident district sales manager. It conclusively demonstrates as follows:

(a) Air India is a foreign corporation not licensed to do business in Florida (R. 40).

(b) Air India, however, maintained a permanent office in Dade County, Florida. The person served, Joseph M. Boggs, ran the Air India office in Miami, Florida. The office was located at Room 611, 100 Biscayne Boulevard North (R. 58, 60). Air India paid the rent in that office (R. 60).

(c) Mr. Boggs was a permanent resident of Miami where he had lived most of his life (R. 58-59). He personally was served with process in Florida in both of these cases (R. 59).

(d) Mr. Boggs was employed by Air India and had been so employed for fourteen months prior to the time of his deposition on March 3, 1967 (and thus had been employed prior to time of the accident) (R. 59). He was the district sales manager for Air India when served (R. 59).

(e) This was a full-time job (R. 60). In addition, three other persons worked out of the Air India office in Miami, Florida. All three likewise were residents of Dade County (R. 60-61). At the time of service herein, they also were employed by Air India (R. 61).

(f) Two of the three employees had worked for Air India for some two years prior to the time of the deposition; and a third had been employed since December 1, 1966 (R. 61). Air India had maintained the office for approximately two and one-half years prior to deposition (and thus prior to accident) (R. 61). Thus, at the time of the crash and at the time of service, there were resident employees running a business office for Air India in Dade County.

(g) Mr. Boggs, the district sales manager, was engaged in promoting sales of seats out of the New York area for Air India and through all of the other routes. Tickets actually were issued out of the Miami Office and reservations were taken, and connections arranged (R. 62).

(h) Of the other three employees, one was a sales representative, another a reservations clerk, and a third a senior secretary (R. 62).

(i) Air India maintained a telephone number in the Miami telephone book (R. 62) and put out literature and promotional material in Dade County promoting the sale of seats on Air India (R. 62, 63).

(j) Tickets issued directly from the Biscayne Boulevard office (R. 63). Tickets were sold on a regular and systematic basis out of the Miami office (R. 63-64).

(k) Mr. Boggs, who was personally served, was the superior company man in Florida; he supervised the other three employees and answered only to the sales manager for the United States of America and Canada in New York (R. 64). He had the power to hire and fire employees and, in fact, hired one of the employees on the job (R. 64). Air India paid Mr. Boggs a regular salary (R. 64). The jobs were full time for the employees (R. 65), and Air India, of course, paid the rent at the Miami office (R. 65).

This activity clearly constituted sufficient "contacts" with Florida to subject Air India to service of process within the state under the authorities hereinafter discussed.

Manifestly, the facts showed that the corporation was "present" in Florida in the traditional sense. The facts, which are undisputed, were summed up carefully in footnote 3 of the opinion of the Fifth Circuit Court of Appeals, 393 F.2d 508 (P. App. p. 7).

V

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There simply is no true conflict of this decision (393 F.2d 507) with any of the modern and recent decisions of the various circuit courts of appeal dealing with the issues here, nor with the doctrines of law enunciated by this Court insofar as they are applicable here on the constitutional issues; nor with the decisions of the Florida courts interpreting F.S. 47.17(4); nor is there any grave or important question involving Federal constitutional law or Federal law or procedure presented or passed upon; nor is any departure from accepted standards of judicial procedure demonstrated; nor is there any question of import whatsoever involving interpretation of Florida law; and thus no writ of certiorari should issue here. (See Rules of United States Supreme Court, Rule 19).

All that the Fifth Circuit Court of Appeals did here was to construe a Florida Statute, F.S. 47.17(4). It held that personal service could properly be made upon a resident business agent of a foreign corporation which was sufficiently connected with the State of Florida, and present in the State Florida in the traditional sense, under that statute. In short, in accordance with established constitutional law, the Fifth Circuit held that requirements of due process were met by the service here, and that in personam jurisdiction over the defendant under the Florida Statute, was effected here.

It construed the Florida statute as permitting personal service on such a corporate figure, and thus no im-

portant question is involved nor is any new constitutional issue presented. In short then, the court below simply held that upon the facts presented, the corporation was sufficiently connected with Florida so as to be "present" in the traditional sense; that the Fourteenth Amendment of the due process clause did not require that the cause of action sued upon had to arise out of the foreign corporation's activities in Florida to support personal service upon a corporate representative of the significance and status of Boggs, where the corporation was systematically and continually present in Florida; and held further that, F.S. 47.17(4), and Florida law, provided for just such service.

The Florida "Long-Arm" Statutes, of course, are construed as broadly as is consistent with due process; PHILLIPS v. HOOKER CHEMICAL CORPORATION, 5 Cir. 1967, 375 F.2d 189, 192. This has been held repeatedly, under the various Florida statutes; PHILLIPS v. HOOKER CHEMICAL CORPORATION, supra; H. BELL & ASSOCIATES, INC. v. KEASBEY & MATTISON CO., Fla.Ap. 1962, 140 So.2d 125; WOODHAM v. NORTHWESTERN STEEL & WIRE CO., 5 Cir. 1968, 390 F2d. 27.

Here, in addition to the regular systematic and continuous sale and issuance of tickets in Florida, Air India solicited, issued promotional literature and advertised, and, of primary importance, maintained permanent offices in Florida and resident personnel headed by a resident superior. Under any due process test, the corporation was "present" in Florida.

Moreover, the plaintiffs here were Florida residents. Amenability to suit here clearly meets traditional notions of "fair play".

A. NO CONSTITUTIONAL REQUIREMENT THAT CAUSE OF ACTION ARISE OUT OF CORPORATE ACTIVITIES IN FLORIDA TO JUSTIFY PERSONAL SERVICE UPON RESIDENT MANAGER, WHERE CORPORATION IS PRESENT IN FLORIDA IN CONTINUOUS SYSTEMATIC FASHION AND IS PRESENT IN FLORIDA IN TRADITIONAL SENSE.

Insofar as the petition seems to claim that service upon Mr. Boggs here was constitutionally deficient because the cause of action did not arise out of the activities of Air India in Florida, it is simply mistaken. Where, as here, a ranking business agent of a defendant-corporation actually resides in Florida and engages in sustained, continual business for the corporation out of corporate offices in Florida, and where he is the superior over various other Florida resident employees working out of that office in Florida; and where, as here, the corporation actually maintains office space, advertises, solicits and actually sells tickets in Florida, and does a substantial business in Florida, the corporation in fact is "present" in Florida and may be sued here in personam, through personal service on the resident manager or agent, regardless of the nature of the cause of the action or where it arose.

The state Long-Arm Statutes are not required to permit such in personam jurisdiction in the Florida courts, but certainly they may constitutionally provide for such service and jurisdiction. This is clearly established constitutional law. Indeed, this Court has very recently denied certiorari on virtually the same precise issue in several cases. And the doctrine of constitutional law permitting such acquisition of in personam jurisdiction in a state where a foreign corporation is present in the traditional

sense—regardless of where or how the cause of action against the corporation arose—is established constitutional law; PERKINS v. BENGUET CONSOLIDATED MINING CO., 342 U.S. 437, 72 S.Ct. 413; GELFAND v. TANNER MOTOR TOURS, LTD., 2 Cir. 1964, 339 F.2d 317, 1967, 385 F.2d 116, cert.den. March 25, 1968, U.S., 88 S.Ct. 1198; FRUMMER v. HILTON HOTELS, INTERNATIONAL, 19 N.Y.2d 533, cert.den. 389 U.S. 923, 88 S.Ct. 241; ECK v. UNITED ARAB AIRLINES, INC., 2 Cir. 1965, 360 F.2d 804; OWEN v. ILL. BAKING CORP., W.D. Mich. 1964, 235 F.Supp. 257; PAPPAS v. STMSHIP. ARISTIDIS, E.D. Va. 1965, 249 F.Supp. 692; BONZE v. NARDIS SPORTSWEAR, INC., 2 Cir. 1948, 165 F.2d 33; TAUZA v. SUSQUEHANNA COAL CO., 220 N.Y. 259, 267; 115 N.E. 915 (1917); BRYANT v. FINNISH AIRLINE, 15 N.Y. 2d 426, 430, 208 N.E.2d 439 (1965); WOODHAM v. NORTHWESTERN STEEL & WIRE CO., 5 Cir. 1968, 390 F.2d 27 (controlling here); H. BELL & ASSOCIATES, INC. v. KEASBEY & MATTISON CO., Fla.App. 1962, 140 So.2d 125 (virtually controlling here).

Thus, despite older antiquated authorities cited by the petitioner, it is clear that facts like those presented here clearly support in personam jurisdiction over the foreign corporation, where the tort does not arise out of the corporate activities of the foreign corporation in Florida, where as here, the corporation is "present" in the traditional sense in Florida, and is clearly doing business in Florida in a systematic continuing way, and a responsible resident corporate official or agent is personally served.

B. SERVICE PROPERLY MADE UNDER F.S. 47.17(4), IN ACCORDANCE WITH FLORIDA LAW.

Service in this case on Air India was made personally in Florida, upon their business agent, resident in the state. The personal service was made pursuant to F.S. 47.17(4).

Air India, as a grounds for its motion to dismiss, urged that the alleged causes of action did not arise out of any business activities of this defendant conducted in the State of Florida and that the purported service of process upon it was insufficient and improper. Air India, as well as the trial court, relied upon several Supreme Court of Florida cases decided under different statutes or subdivisions of statutes which, under those statutes or subdivisions, required that the cause of action sued upon—to justify service on a foreign corporation—must have "arisen out of" that corporation's activities in Florida or be connected with such activity. But not one of those cases hold that such a showing is required under 47.17(4) of the Florida Statutes. Indeed, the statute does not require such a showing; and, as the plaintiffs will demonstrate, that particular subdivision, both at the time of service here, and as it now exists in amended form, effective July 26, 1967, is not conditioned upon any such showing. The cases upon which the defendant and the trial court relied, of course, are: Zirin v. Charles Pfizer & Co., Inc., Fla. 1961, 128 So.2d 594; Illinois Central Railroad Co. v. Simari, Fla. 1966, 191 So.2d 427; see also, Giannini Controls Corporation v. Eubanks, Fla. 1966, 190 So.2d 171.

A careful reading of these authorities shows that they have absolutely nothing to do with jurisdiction in this case, or with F.S. 47.17(4), the statute under which jurisdiction properly was obtained here. The statutes dealing with

service of process on a foreign corporation, like Air India, doing business in Florida or having contacts with it, are F.S. 47.16; 47.17 (1) through (7) (separate requirements); and 47.171.

The challenge to jurisdiction based upon the argument that the cause of action "did not arise out of the activities" of the corporation in Florida confuses the various statutes and their requirements. Whether it did or did not so "arise" is irrelevant here, under 47.17(4). An analysis of the various statutes and cases shows why.

a. F.S. 47.16 provides for service of process upon a foreign corporation, doing or transacting business in Florida, through service upon the Secretary of State. The statute specifically requires that constructive service under its provisions is permissible only where the cause of action sued upon arises "out of any transaction or operation connected with or incidental to such business." That statute is not involved here.

b. F.S. 47.17 at the time of the accident herein, and at the time of service contained seven separate subdivisions. The statute in its entirety provides as follows:

"Service of process on private corporation.—Process against any corporation, domestic or foreign, may be served:

"(1) Upon the president or vice-president, or other head of the corporation; and in the absence of such head;

"(2) Upon the cashier, treasurer, secretary or general manager; and in the absence of all the above:

"(3) Upon any director of such company; and in the absence of all the above:

"(4) Upon any officer or business agent, resident in the state. [Statute and subdivision here involved].

"(5) If a foreign corporation shall have none of the foregoing officers or agents in this state, service may be made upon any agent transacting business for it in this state.

"(6) This section shall not apply to service of process upon insurance companies.

"(7) The provisions of this section shall be cumulative to all existing laws."[2]

---

[2]The legislature recently added a subsection (8), presumably designed simply to *clarify* existing law and possibly to *delimit* service further by the requirement of an "office", in addition to a "resident" business agent to avoid any "arising out of" proviso, effective July 25, 1967. The statute now provides:

"CHAPTER 67-399

"Senate Bill No. 877

"AN ACT relating to commencement of suits at law and process; amending section 47.17, Florida Statutes, by adding subsection (8), providing for service of process upon private corporations.

"*Be It Enacted by the Legislature of the State of Florida*:

"Section 1. Section 47.17, Florida Statutes, is amended by adding subsection (8) to read:

"47.17 Service of process on private corporation.—Process against any corporation, domestic or foreign, may be served:

"(8) Where a corporation has a business office within the state and is actually engaged in the transaction of business therefrom, service upon any officer or business agent, resident in the state, may personally be made, pursuant to this section, and it is not necessary in such case, that the action, suit or proceeding against the corporation shall have arisen out of any transaction or operation connected with or incidental to the business being transacted within the state.

"Approved by the Governor July 25, 1967.

"Filed in Office Secretary of State July 26, 1967."

The addition, of course, *covers the precise situation here* and it merely restates *what always* has been the law in Florida.

e. Section 47.171 provides as follows:

"Service of Process; domestic and Foreign Corporations.—When any domestic or foreign corporation shall fail to comply with §§47.34 and 47.35 relating to the designation of the place for service of process, or in the alternative, with §47.36 relating to the designation of the office of the clerk of the circuit court as a place for service of process, then process directed to any domestic corporation failing to comply with said sections may be served upon any officer or agent of such domestic corporation resident in the state or transacting business for it in the state. Process directed to any foreign corporation failing to comply with said sections may be served upon any agent of such foreign corporation **transacting business for it in Florida.**"

This statute is not here involved.

An analysis of this case shows that service of process and jurisdiction properly was obtained under §47.17(4), even as it existed at the time of service here. As will be demonstrated herein, service under that statute and subdivision in no way required that the cause of action sued upon shall have arisen upon activities of the defendant in Florida.

None of the three Supreme Court cases dealt with former F.S. 47.17(4). In the Zirin case, supra, the court held that under F.S. 47.171, which provided that process might be served upon "any agent [regardless of residency in Florida or position in corporation hierarchy] of such foreign corporation **transacting business for it in Florida**", the underlying cause of action sued upon must have arisen out of business transacted by the defendant in Florida. F.S. 47.17(4) was not involved in any manner, shape or form in that case.

In the Simari case, supra, at 191 So.2d 428, the Supreme Court of Florida specifically held that service was improper under F.S. 47.171 and 47.17(5) supra—the propriety of service under F.S. 47.17(4) was not even mentioned, let alone passed upon. There, an attempt was made to serve an agent of the foreign corporation under F.S. 47.171 and 47.17(5), on the contention that the agent was "transacting business for" the foreign corporation within the State of Florida. But the very words and language contained in F.S. 47.171 were found also in 47.17(5) and had already been held in the Zirin case to require that the action sued upon must have arisen out of, or been connected with, the activity performed by the defendant in the State of Florida. This was the clear, specific and sole holding of Simari. It was based on similarity of language in 47.17(5) and 47.171 (191 So.2d at 28). Nothing in the opinion even suggests that propriety of service upon a business agent resident in the state under 47.17(4) was raised or argued or considered or involved.

Finally, in the Giannini case, supra, the Supreme Court held only that under §47.16, constructive service on a foreign corporation allegedly doing business in Florida, could be had only where the cause of action sued upon arose out of the activities of the corporation in Florida. The holding simply recognized the specific language found in F.S. 47.16.

On the other hand, jurisdiction was founded here on F.S. 47.17(4). That subdivision provides that service may be made upon a foreign corporation by service upon "any officer or business agent, resident in the state" in the absence of certain designated officers of the corporation or directors. Thus, in the case of a business agent, resident

in the state, personal service upon him may be made effectively binding the corporation even for a tort not arising out of corporate activities in the State of Florida. This is so because under §47.17(4), a mere transitory or non-resident agent, who does not qualify as a resident business agent, or an agent conducting sporadic business for the corporation in Florida, is not contemplated. This type of sporadic or non-resident agent and sporadic or irregular "doing business" is contemplated under the broad language of §§47.16, 47.17(5) and 47.171, where the tort must arise out of corporate activity in Florida to support service.

But where a business agent of the defendant corporation actually resides in Florida and engages in sustained, continual business for the corporation, the corporation is in fact "present" in Florida, and may be sued here by service on the resident agent, regardless of the nature of the cause of action or where it arose. This is established doctrine in this area of the law, and the distinction between the various types of statutes has repeatedly been recognized. See, e.g., Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413; Gelfand v. Tanner Motor Tours, Ltd., 2 Cir. 1964, 339 F.2d 317, 1967, 385 F.2d 116, cert.den. March 25, 1968, ____ U.S. ____, 88 S.Ct. 1198; Frummer v. Hilton Hotels, International, 19 N.Y.2d 533, 227 N.E. 2d 851 (1967), cert. den. 389 U.S. 923, 88 S.Ct. 241; Eck v. United Arab Airlines, Inc., 2 Cir. 1965, 360 F.2d 804; Owen v. Ill. Baking Corp., W.D. Mich. 1964, 235 F.Supp. 257; Pappas v. Stmship. Aristidis, E.D. Va. 1965, 249 F.Supp. 692; Bonze v. Nardis Sportswear, Inc., 2 Cir. 1948, 165 F.2d 33; Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267; 115 N.E. 915(1917); Bryant v. Finnish National Airline, 15 N.Y. 2d 426, 430, 208 N.E. 2d 439 (1965); Woodham

v. Northwestern Steel & Wire Co., 5 Cir. 1968, 390 F.2d 27; H. Bell & Associates, Inc. v. Keasbey & Mattison Co., Fla. App. 1962, 140 So.2d 125.

Indeed, 47.171 specifically notes the difference between the two types of agents as do 47.17(4) and (5).

Thus, the Third District Court of Appeal in H. Bell & Associates, Inc. v. Keasbey & Mattison Co., Fla.App. 1962, 140 So.2d 125, decided well before the clarifying addition to F.S. 47.17, sustained service of process under F.S. 47.17(1) even though the cause there did not arise out of Florida activities. The court carefully analyzed the different requirements for effective service and jurisdiction under the diverse subdivisions of §47.17. In that case, the Third District Court of Appeal pointed out specifically that under 47.17, only subdivision (5) contained the magic words of 47.171 ("any agent . . . transacting business for it" in Florida), which, under Zirin, supra, required that the cause of action "arise out of" Florida activities of the defendant. In Keasbey, process was personally served on the "head" of the corporation under F.S. 47.17(1). The cause of action involved arose outside of Florida and was unconnected with corporate activities in Florida. The Third District Court of Appeal upheld the service on the head of the corporation in Florida, pointing to the different language in 47.16, 47.171, 47.17(5) and 47.17(1); as under 47.17(1), the statute involved in this case, 47.17(4), in its former posture, did not contain the limiting words, and a permanent resident business agent likewise could be served—like the head of the corporation, without the "arising out of" proviso.

The **Keasbey** case, supra, was specifically cited with approval in the **Simari** case, supra, 191 So.2d at 428 by the Florida Supreme Court. The Florida Supreme Court there noted the **Keasbey** rationale, equating 47.17(5) and 47.171 requirements that the tort arise out of corporate activities in Florida, because of their similar language.

But to hold that under 47.17(4), in its pre-July 26, 1967, form, a cause of action must have arisen out of corporate activities in Florida to support service, could lead to absurd results. For example, General Motors could have leased an entire building in Florida on a permanent basis to carry on a mass of activity and staff it with hundreds of men under **supervisors resident in Florida**; yet a Florida resident injured by a defective General Motors product or car, in Florida, could not sue if the car, for example, were improperly made and sold in Detroit. Such a result would likewise have discouraged corporations from securing licenses to do business in Florida—it would have benefitted a corporation to set up offices here and not to secure licenses subjecting them to service.

Here, Air India was "present" permanently and continually in Florida. Its office was run by a business agent **resident** in the State. Under **Keasbey** and its rationale, and under traditional "presence" concepts (see, e.g., cases cited above), and under the clear purpose of the Florida statutes, to reach as far as due process permits, service here, under 47.17(4) was proper. Certainly the agent who ran the corporate offices in Florida, qualified as a "business agent" resident in the State (R. 62, 71); see, **George A. Hormel & Co. v. Ackman**, 117 Fla. 419, 158 So. 171.

The complaint alleged that Air India was doing business in Florida, and the proof shows that it had a resident business agent in Florida who was amenable to service of process. The proof shows that the defendant ran a business office here on a permanent and systematic basis and transacted business here. Under 47.17, subdivision 4, as it existed prior to the amendment, service was properly effected. The judgment of dismissal in each case thus properly was dismissed.

Moreover, the precise issue under the same statute was passed upon by the Fifth Circuit Court of Appeals in Woodham, supra, 390 F.2d 27, making the precise distinctions. There, the Fifth Circuit, in precise accordance with the decision in Keasbey, supra, and this case, specifically held that in personam jurisdiction properly was obtained.

Air India apparently confuses this type of statute 47.17(4), with a "single act" statute which might require as a prerequisite that the cause of action sued upon arise out of the foreign corporation's activities in the particular state; see, e.g., Gelfand v. Tanner Motor Tours, Ltd., supra; Frummer v. Hilton Hotels, International, supra; Eck v. United Arab Airlines, Inc., supra. But certainly there is no such prerequisite here, where the corporation is present and the statute is construed in accordance with constitutional principles; Perkins v. Benguet Consolidated Mining Co., supra, and cases cited there and hereinbefore in this brief.

Finally, the petitioner, Air India, cites various cases in its petition, none of which are relevant here; James v. Kush, Fla.App. 1963, 157 So.2d 203 deals with F.S. 47-16

which is not involved here; O'Connell v. Losch, Fla.App. 1967, 194 So.2d 700 deals with F.S. 47.16, which is not involved here; Unterman v. Brown, Fla.App. 1964, 169 So.2d 522, deals with F.S. 47.16, which is not involved here; Zirin v. Charles Pfizer & Co., Fla. 1961, 128 So.2d 594, deals with F.S. 47.171 which is not involved here; Illinois Central Railroad Company v. Simari, Fla. 1966, 191 So.2d 427, deals with F.S. 47.17(5), which is not involved here; Manus v. Manus, Fla.App. 1966, 193 So.2d 236, which purports to deal with the Florida Long-Arm Statutes in general, goes off on the erroneous theory that due process would require that the tort arise out of corporate activities in Florida, is inapplicable here, and is erroneous as a matter of constitutional doctrine anyway.

Accordingly the petition for a writ of certiorari should be denied for many reasons; the decision of the Fifth Circuit is in complete accordance with the authorities interpreting the Constitution under Long-Arm Statutes like this one; and is in accordance with the cases most recently decided in which this Court has denied petitions for writs of certiorari and is in accordance with Florida law. The corporation was present on a continuous systematic basis; the corporate figure served was a responsible corporate figure and notice was assured and in fact was given.

Where the corporation is present in the traditional sense, it is not necessary that the cause of action sued upon arise out of the corporate activities in a particular state to support in personam jurisdiction in that state. All of the recent cases so hold and this is established constitutional doctrine under the Fourteenth Amendment. The case really turns open a simple construction of a

particular Florida statute and is of no consequence anyway since the statute now has been amended specifically providing for such service under the facts and circumstances which existed here.

What we are dealing with then is a simple question of the construction of a Florida statute which is applicable to a smattering of cases only, because it has been amended anyway to reflect what always has been the law. No important question, either constitutional, federal or state, is presented; and the decision of the Fifth Circuit was eminently correct on the merits. The petition should be denied in all respects.

VI

CONCLUSION

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Joel H. Fisher, Esq., of Fisher, Sharlitt & Gelband, Suite 1000, 1522 K Street, N.W., Washington, D. C. 20005, and Jackson L. Peters, Esq., of Knight, Underwood, Peters, Hoeveler & Pickle, 628 Ingraham Building, Miami, Florida 33131, Attorneys for Petitioner; and Dixon, DeJarnette, Bradford, Williams, McKay & Kimbrell, Attorneys for The Boeing Company, Dade Federal Building, Miami, Florida, this 5 day of September 1968.

WALTER H. BECKHAM, JR.